SUBRAMANIAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Gunn Chit Tuan J.) March 13, 1984]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 163 of 1982]

Criminal Law and Procedure – Summary trial – Cheating – Burden of proof on accused – Standard of proof – Penal Code, s. 420

Penal Code, s. 420 – Cheating – Burden of proof.

This was an appeal against the conviction of the appellant for an offence of cheating under section 420 of the Penal Code. The principal ground of appeal was that the learned President of the Sessions Court had applied the wrong test regarding the onus on the defence. In his grounds of judgment the learned President had referred to the question whether the evidence of the accused had "disproved the prosecution case in its entirety" and he stated that he was not convinced that the accused's version of the incident was reasonable and probable.

Held: the judgment of the learned President read as a whole would suggest that he had put a higher burden on the defence to show that the accused's version was reasonable and probable. This has occasioned a failure of justice and therefore the appeal should be allowed and a re-trial ordered.

Cases referred to:

(1) *Mohamed Yatim bin Abu Bakar* v. *Public Prosecutor* [1950] M.L.J. 57, 59.
(2) *Koay Teik Choo* v. *Regina* [1956] M.L.J. 52, 53.
(3) *Mraz* v. *The Queen* (1955) 93 C.L.R 493.
(4) *Mahadi* v. *Public Prosecutor* [1970] 1 M.L.J. 16.
(5) *R.* v. *Attfield* (1961) 45 Cr. App. R. 309, 313.

CRIMINAL APPEAL

G. Sri Ram for the appellant

Tee Hong Geok (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Gunn Chit Tuan J.: The appellant, an employee of the Telecoms Department, was charged and convicted for an offence of cheating under section 420 of the Penal Code. He was alleged to have dishonestly induced the manager of a company to deliver to him on June 26, 1981, a cash sum of $141/- by representing himself to be a technician sent by the Telecoms Department to fix two extension telephones which the said manager had applied for about a month before the date in question.

The appellant's defence was that the said manager had asked him to install two sets of inter-communication units in his office and he had fixed them in the said office for the agreed price of $280/- and he denied that he had ever fixed the extension telephones. After he had fixed the two sets of inter-communication units, the said manager only paid him the cost of one unit and tried to evade payment of the balance sum for the other unit.

There were several grounds of appeal against conviction but Mr. Sri Ram, counsel for the appellant, concentrated his argument on two of them and the main thrust of his contention was that the learned President erred because the effect of his written judgment meant that the defence had to disprove the prosecution's case. He submitted that the learned President had applied the wrong test regarding the onus on the defence which Spenser Wilkinson, J. (as he then was) had indicated in *Mohamed Yatim bin Abu Bakar* v. *Public Prosecutor*[1] and *Koay Teik Choo & Ors.* v. *Regina* [2] was the wrong approach. The learned Judge had pointed out in those cases that it was wrong to approach the question of the guilt or innocence of the accused on the basis of deciding which of the two stories, namely that of the prosecution or of the defence, the Court should believe. His Lordship had also suggested that the correct approach was for the Court to consider whether the story of the accused has thrown a reasonable doubt on the truth of the prosecution's case and, if so, the accused is entitled to an acquittal. Counsel in this appeal referred specifically to the following passages in the judgment of the learned President:–

"In the instant case, all that this court need to consider is whether in all the totality of evidence, it is reasonable and probable that the accused did not fix the extension telephones as alleged but an inter-communication unit the existence of which was not brought into evidence by the prosecution. If it is then it would mean that he would have disproved the prosecution case in its entirety.", and "I am not convinced that the defendant's version of the incident was reasonable and probable."

and submitted that the learned president had erred in having imposed a higher burden on the appellant to prove that his defence was reasonable and probable.

As regards the question of whether the judgment of the learned President should be reversed, counsel contended that the error in the judgment had occasioned a failure of justice. He referred to a passage in the judgment of the High Court of Australia in *Mraz* v. *the Queen* [3] that "every law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If

there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eyes of the law, a miscarriage of justice." Counsel conceded that although there was a misdirection yet the prosecution in this case has adduced all the evidence it had, so that the failure of justice occasioned by the trial President in placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution (See *Mahadi* v. *Public Prosecutor*).[4]

It was the contention of the learned deputy that the President had not erred or misdirected himself on the burden of proof and that there has been no failure of justice. In all fairness to the learned President it must be said that he had taken the trouble to write a judgment covering nine pages, but it was difficult to reject the contention of learned counsel for the appellant that because of the two offending passages quoted above, the judgment read as a whole would suggest that the learned President had put a higher burden on the defence to show the defendant's version to be reasonable and probable.

It is important for trial magistrates and presidents to direct themselves correctly on the burden of proof. In this respect I think it would not be inappropriate to refer to the following passage in the judgment of the U.K. Court of Criminal Appeal in *R.* v. *Attfield* [5]although their Lordships' observations in that appeal were concerned with the necessity for a clear direction on the burden of proof in a trial by jury:-

"..... It is fair to say that over and over again appeals are brought to this court, or applications are made for leave to appeal based on alleged inadvertencies in direction as to the burden of proof, and this court finds itself in the position of having to apply, so to speak, two parallel principles. In the first place, the direction as to the burden of proof and as to the standard of proof is undoubtedly of cardinal importance. That is a point in favour of the appellant, and if the direction fails in that respect, then indeed the appeal is all the more cogent. On the other hand, there is a counterbalancing principle that this court has said that the words of a summing-up are not to be weighed in too nice scales provided that the substance of the summing-up presents to the jury the issue in a form in accordance with law. It is in the application of those two counterbalancing principles that this court fulfils its function."

Similarly, in applying those two parallel principles in fulfilling its function this court has to allow the appeal as the direction as to the burden of proof and to the standard of proof on the appellant was such that it has, in my judgment, occasioned a failure of justice. In the circumstances of this case and in fairness to both the prosecution and the appellant, there should be a re-trial before another President.

Re-trial ordered.

Solicitors: *Sri Ram, Zulkifly & Kumar.*

MAJA ANAK KUS v. PUBLIC PROSECUTOR

[A. Cr. J. (Tan Chiaw Thong J.) March 29, 1984]

[Miri – Criminal Appeal No. 1 of 1984]

Criminal Law and Procedure – Charge of offence under s. 324 Penal Code – Bailable offence – Whether accused can be authorised to be detained in police custody for further investigation – Criminal Procedure Code (F. M.S. Cap. 6), ss. 28, 117 & 383.

Penal code, s.324 – Voluntarily causing hurt by dangerous weapon – Detention of accused – Whether order rightly made.

In this case the appellant was arrested for an offence of voluntarily causing hurt by a dangerous weapon under section 324 of the Penal Code, a bailable offence. The learned Magistrate made an order authorising his detention in police custody for 14 days under the provisions of section 117 of the Criminal Procedure Code. The appellant appealed.

Held, dismissing the appeal: the learned Magistrate had exercised her discretion rightly in this case and had fully complied with the provisions of section 117 of the Criminal Procedure Code.

Case referred to:-

(1) *Reg.* v. *Lim Kwang Seng & Others* [1956] M.L.J. 178.

CRIMINAL APPEAL.

M.S. Sandhu for the appellant.

Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Tan Chiaw Thong J.: This is an appeal by the Appellant against the order of the lower Court authorising his detention in police custody for 14 days under the provisions of section 117 of the Criminal Procedure Code.

There are three grounds of appeal, as follow:-

(1) The learned magistrate erred in law in holding that "Section 387 does not confer on a person accused of